Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

JERRY T. DIXON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the due process defense of entrapment by estoppel is available to defend against a violation of 18 U.S.C. § 1955?

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Appendix B — Order Of The United States District Court For The Middle District Of Tennessee, Northeastern Division Dated And Filed July 14, 1997 ..... 11a

Petitioner Jerry T. Dixon respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is unreported. (App. A). The order of the district court in *United States v. Jerry Dixon*, No. 2-96-00014 (M.D. Tenn. 1997) is not reported. (App. B). (The district court's order refers to "reasons stated on the record." Appendix B also includes transcript excerpts which comprise the district court's "reasons.")

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit ("Court of Appeals") was entered on January 27, 1999. This petition for writ of certiorari was filed within 90 days of the entry of the judgment of the Court of Appeals for the Sixth Circuit.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law."

18 U.S.C. § 1955 provides:

Prohibition of illegal gambling businesses

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined under this title or imprisoned not more than five years, or both.

(b) As used in this section —

(1) "illegal gambling business" means a gambling business which —

(I) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of

Puerto Rico, and any territory or possession of the United States.

(c) If five or more persons conduct, finance, manage, supervise, direct, or own all or part of a gambling business and such business operates for two or more successive days, then, for the purpose of obtaining warrants for arrests, interceptions, and other searches and seizures, probable cause that the business receives gross revenue in excess of $2,000 in any single day shall be deemed to have been established.

(d) Any property, including money, used in violation of the provisions of this section may be seized and forfeited to the United States. All provisions of law relating to the seizure, summary, and judicial forfeiture procedures, and condemnation of vessels, vehicles, merchandise, and baggage for violation of the customs laws; the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from such sale; the remission or mitigation of such forfeitures; and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to seizures and forfeitures incurred or alleged to have been incurred under the provisions of this section, insofar as applicable and not inconsistent with such provisions. Such duties as are imposed upon the collector of customs or any other person in respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the customs laws shall be performed with respect to seizures and

forfeitures of property used or intended for use in violation of this section by such officers, agents, or other persons as may be designated for that purpose by the Attorney General.

(e) This section shall not apply to any bingo game, lottery, or similar game of chance conducted by an organization exempt from tax under paragraph (3) of subsection (c) of section 501 of the Internal Revenue Code of 1954, as amended, if no part of the gross receipts derived from such activity inures to the benefit of any private shareholder, member, or employee of such organization except as compensation for actual expenses incurred by him in the conduct of such activity.

Tenn. Code Ann. § 8-7-103 provides:

Each district attorney general:

(1) Shall prosecute in the courts of the district all violations of the state criminal statutes and perform all prosecutorial functions attendant thereto, including prosecuting cases in a municipal court where the municipality provides sufficient personnel to the district attorney general for that purpose;

(2) Shall prosecute in the federal court all criminal cases removed from a state court in the district to any inferior court;

(3) May cooperate and assist, upon the request or direction of the attorney general and reporter, in

the bringing, prosecution, defense, preparation, and trial of all cases in the circuit and chancery courts in which the attorney general and reporter is required to appear for the protection of the state or the public interest;

(4) Shall give an opinion, without charge, whenever called upon by any county officer in the district, upon a question of criminal law relating to the duties of the county officer's office;

(5) Shall submit to the office of executive director for the district attorneys general conference within ninety (90) days after the end of each fiscal year, a written report specifying:

(A) Each source from which funds were received by the office of the district attorney general during the fiscal year;

(B) The amount of funds received from each source; and

(c) The disposition of such funds.

(6) Shall have discretion in the performance of duties and responsibilities in the allocation of resources available to such district attorney general, any other provision of law notwithstanding; and

(7) Shall have authority to delegate the foregoing duties and responsibilities to an assistant district attorney general.

STATEMENT OF THE CASE

In April of 1992, agents of the Federal Bureau of Investigation and agents of the Tennessee Bureau of Investigation began investigating Petitioner Jerry T. Dixon (hereafter "Petitioner Dixon") for the alleged distribution of gambling devices. The investigation continued until April 21, 1993, when, pursuant to a search warrant, the agents conducted a "raid," seizing the alleged gambling devices and other associated evidence.

Petitioner Dixon was indicted on November 23, 1996. A Superseding Indictment followed on December 13, 1996. On March 24, 1997, the day before the trial was set to begin, the government filed a motion in limine to prevent Petitioner Dixon from introducing evidence regarding the defense of entrapment by estoppel.

On May 30, 1997, Defendant Dixon entered a conditional plea of guilty to operating an illegal gambling business (Count One, 18 U.S.C. § 1955), and engaging in an unlawful monetary transaction (Count Thirteen, 18 U.S.C. § 1957), preserving his right to challenge the district court's decision to bar the defense of entrapment by estoppel. Petitioner Dixon was subsequently sentenced to twenty-four (24) months in a federal correctional facility.

On August 25, 1997, pursuant to his conditional plea of guilty, Petitioner Dixon timely filed notice of his appeal of the district court's order granting the government's motion in limine barring the defense of entrapment by estoppel. The Court of Appeals reversed the district court's decision to exclude evidence relating to a good faith defense as to the specific intent crime of money laundering but affirmed the

district court's decision to prohibit Petitioner Dixon from offering an entrapment by estoppel defense as to the general intent crime of gambling.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE SIXTH CIRCUIT COURT OF APPEALS DECIDED AN IMPORTANT CONSTITUTIONAL QUESTION IN A MANNER THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

Petitioner Dixon submits that the Court of Appeals' decision is contrary to the letter and spirit of: *Crane v. Kentucky*, 476 U.S. 683 (1986); *California v. Trombetta*, 467 U.S. 479 (1984); *Mathews v. United States*, 485 U.S. 58 (1988); *Raley v. Ohio*, 360 U.S. 423 (1959); and *Cox v. Louisiana*, 379 U.S. 559 (1965).

A. Petitioner Dixon Has A Fundamental Constitutional Right To Present A Complete Defense.

This Court has unanimously stated that a defendant has "a fundamental constitutional right to a fair opportunity to present a defense." *Crane v. Kentucky*, 476 U.S. 683, 687, 90 L. Ed. 2d 636, 643, 106 S. Ct. 2142 (1986). The *Crane* Court cited *California v. Trombetta* which states:

> Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness. We have long interpreted this standard of fairness

> to require that criminal defendants be afforded a meaningful opportunity to present a complete defense.

467 U.S. 479, 485, 81 L. Ed. 2d 413, 419, 104 S. Ct. 2528 (1984).

Therefore,

> [a]s a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in its favor.

Mathews v. United States, 485 U.S. 58, 63, 99 L. Ed. 2d 54, 61, 108 S. Ct. 883 (1988) (citations omitted); *See United States v. Hurst*, 951 F.2d 1490, 1499 (6th Cir. 1991).[1]

> Although the defendant's initial burden requires presenting more than a scintilla of evidence, the evidence need not be so substantial that if uncontroverted, a court may find entrapment as a matter of law.

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1. [T]he United States Supreme Court and several circuit courts have recognized the criminal doctrine of entrapment by estoppel which is based upon fundamental notions of fairness embodied in the Due Process Clause of the Constitution

United States v. Levin, 973 F.2d 463, 468 (6th Cir. 1992); *See*, Sean Connelly, *Bad Advice: The Entrapment by Estoppel Doctrine in Criminal Law*, 48 U. Miami L. Rev. 627 (1994).

United States v. Santiago-Godinez, 12 F.3d 722, 727-728 (7th Cir. 1993) (citations omitted).

In *Hurst*, the defendant was allowed to admit evidence that she relied on the inaction of state compliance personnel in running an illegal bingo hall. 951 F.2d at 1499. However, the trial court rejected the defendant's request for a jury instruction on the defense of entrapment by estoppel. The Court of Appeals affirmed, stating "there is simply no evidence that the defendants were ever told by state officials that their actions were legal." *Id.*

In the instant case, however, there is considerable evidence that the actions of state officials caused Petitioner Dixon to believe that his conduct was legal. For example, at one point in the early 1980's, Petitioner Dixon became concerned about the legality of his video poker machines following raids in the area. Petitioner Dixon removed several of the machines from their public locations. To determine if the machines posed a problem, Petitioner Dixon sought the advice of District Attorney Tommy Thompson. At a meeting with the District Attorney, Petitioner Dixon asked if he should return the machines to their public locations, specifically, the Macon County Country Club. According to Petitioner Dixon: "[Tommy Thompson] said, well, it would be okay. He said, I don't see anything more wrong with poker machines than I do the poker games they have out there." Because Petitioner Dixon had personally demonstrated the operation of a video poker machine to the District Attorney and because he believed it was common knowledge that pay-offs occurred on the machines, Petitioner Dixon relied on the advice of the District Attorney and returned the machines to their public locations.

Petitioner Dixon received similar advice from Assistant District Attorney John Wootten, who informed him that the machines were "all right," despite the fact that Mr. Wootten assumed that the machines were "paying off." At the time, Mr. Wootten also served as President of the country club where several machines were located and where pay-offs were common knowledge. Also aware that pay-offs were common knowledge, Petitioner Dixon believed that machines that "paid off" were, in the words of the District Attorney, "okay."

In *Hurst*, after finding no evidence that state officials instructed the defendants as to the legality of their conduct, the Court of Appeals for the Sixth Circuit wrote

> [m]oreover, the statements allegedly relied upon were made by state officials relating to state law, while the defendants were charged with violations of federal law.

951 F.2d at 1499.[2] In fact, the *Dixon* Court observed:

> In *Hurst*, this court clearly stated, with respect to the same offense at issue in this case, that the defense of entrapment by estoppel is not available to a defendant who relies upon the advice of state officials. Considering the fact that an element of 18 U.S.C. § 1955 is a violation of state law, our holding in *Hurst* seems somewhat harsh; as Dixon argues, where else would an individual turn of advice as to the legality of particular actions under state law?

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2. Unlike those members of society who have formal legal training, the average layperson does not differentiate between state and federal law and state and federal officials.

(Appendix A, p. 6). Other Circuits have also held that, when asserting the defense of entrapment by estoppel with regard to a federal crime, the defendant must have reasonably relied on the advice of a federal, not state, official. *See United States v. Spires*, 79 F.3d 464, 466-467 (5th Cir. 1996); *United States v. Brebner*, 951 F.2d 1017, 1026 (9th Cir. 1991); *United States v. Etheridge*, 932 F.2d 318, 320-321 (4th Cir. 1991). There is, however, an exception to this general rule, which applies to Petitioner Dixon.

In *United States v. Brady*, 710 F. Supp. 290, 294 (D. Colo. 1989), the court held that "it would violate due process to convict Brady of this offense in light of the fact that the defendant's conduct conformed to the judge's statement of law." *See Etheridge*, 932 F.2d at 323 (Mullen, J., dissenting) ("I find the reasoning in [*Brady*] persuasive. . . ."). The *Brady* court based its decision on the authority and duty of the state judge "to interpret and apply" federal law, especially with "regard to this particular statute [felon in possession of firearm] because state convictions trigger the applicability of the law." *Id.* at 295. The court also noted that in Colorado, civil officers are required to take an oath to support the United States Constitution. *Id.* In *United States v. Conley*, the court extended the reasoning in *Brady* to *all* state and local officials:

> The Government asks that the Court apply a per se rule to deny the defense [of entrapment by estoppel] and hold that the federal government cannot be estopped from enforcing its criminal laws by the conduct of state or local officials. The Court declines to adopt such a per se rule. The Government can point to numerous authorities holding or urging that the due process clause can be invoked only in reliance upon federal government conduct.

* * *

> The focus of the Due Process inquiry into fundamental fairness and substantial justice, however, should not be arbitrarily constrained by concepts taken from other contexts such as estoppel, actual authority or deterrence.

859 F. Supp. 909, 932 (W.D. Pa. 1994) (citations omitted). The *Conley* Court concluded that "the Due Process clause may still invalidate certain prosecutions under Section 1955 solely on the basis of reliance upon advice from state or local officials." *Id.*

The reasoning in *Brady* and *Conley* is applicable to Petitioner Dixon. In Tennessee, District Attorneys are required to take an oath to support the Constitution of the United States. *See* Tenn. Code Ann. § 8-18-106 *et seq.* The District Attorney is "a constitutional officer" and "a quasi judicial officer." *Pace v. State*, 566 S.W.2d 861, 865 (Tenn. 1978) (Henry, C.J., concurring). A District Attorney's knowledge of federal law is evident in the District Attorney's statutory duty to "[p]rosecute in the federal court all criminal cases removed from a state court . . ." and duty to "[p]articipate . . . in joint efforts with other state, local or federal officials or agencies. . . ." Tenn. Code Ann. § 8-7-103. Finally, Petitioner Dixon is entitled to rely on the assurances of a District Attorney because, as in *Brady* and *Conley*, a violation of state law is a mandatory predicate for a violation of the relevant federal statute. *See* 18 U.S.C. § 1955(b)(1). To violate the federal gambling statute, Petitioner Dixon had to be in violation of a law of the state of Tennessee. In *Conley*, the court stated:

> One element of a Section 1955 violation is that the business operate in violation of state or local law.
>
> * * *
>
> If a defendant who intended to maintain gambling devices relied on advice from an appropriate state or local official that the conduct was legal, without complicity or corruption on the part of the government official, the Due Process clause would render a state prosecution a nullity. The Court fails to see how a prosecution founded on the same conduct and the same state law would be rendered fundamentally fair because it was instituted by federal authorities.

859 F. Supp. at 932-933. After a review of the facts, however, the court determined that the defendants were not misled by government officials. *Id.* at 936.

Based on the words and actions of District Attorney Tommy Thompson and Assistant District Attorney John Wootten, Petitioner Dixon did not believe he was violating either state or federal law.

B. The Right to Have a Jury Hear a Complete Defense

Extensive evidence exists upon which a reasonable jury could find that Petitioner Dixon relied on a government announcement that his conduct was legal. *See United States v. Levin*, 973 F.2d 463, 468 (6th Cir. 1992). Therefore, based on fundamental fairness and the Due Process clause, the Petitioner Dixon should be allowed to present all of the

evidence relating to the words and actions of state officials in support of his defense. After hearing the evidence, the jury can decide if Petitioner Dixon relied on the authorities' advice and, if so, whether his reliance was reasonable.

"[T]he issue of whether a defendant has been entrapped is for the jury as part of its function of determining the guilt or innocence of the accused." *Sherman v. United States*, 356 U.S. 369, 377, 2 L. Ed. 2d 848, 854, 78 S. Ct. 819 (1958); *See Mathews*, 485 U.S. at 63, 99 L. Ed. 2d at 61. The defense of entrapment by estoppel, a heavily fact-oriented inquiry, raises a question for a jury. *United States v. Evans*, 928 F.2d 858, 860 (9th Cir. 1991); *See United States v. Levin*, 973 F.2d 463, 467 (6th Cir. 1992); *United States v. LaChapelle*, 969 F.2d 632, 637-38 (8th Cir. 1992); *United States v. Ramos*, 961 F.2d 1003, 1006 (1st Cir. 1992); *United States v. Santiago-Godinez*, 12 F.3d 722, 727 (7th Cir. 1993) ("This is because whether entrapment occurred is a factual issue; the defense of which is intertwined with the issue of intent and is often based on credibility determinations, which are traditionally reserved for jury resolution."). "Factfinding is usually a function of the jury, and the trial court rarely rules on a defense as a matter of law." *United States v. Contento-Pachon*, 723 F.2d 691, 693 (9th Cir. 1984) (citations omitted).

Professor Colbert has argued that, when a court prohibits a jury from hearing a defense,

> it jeopardizes the accused's "inherent and invaluable" right to be judged by a jury that has had the opportunity to hear and consider a complete defense to a charge.

39 Stanford L. Rev. at 1317 (*quoting Duncan v. Louisiana*, 391 U.S. 145, 152 (1968)). Professor Colbert believes that precluding a complete defense "seriously erodes (if not completely nullifies) the crucial role of the jury as factfinder" and "denigrates the jury's role in the criminal justice system." *Id.* at 1274 and 1318. Finally, the Professor argues:

> The government's use of the broad motion in limine demonstrates a lack of trust and confidence in the people who serve as jurors. The motion attempts to restrict the factual basis for a decision by asking the court to prevent evidence from ever reaching the jury. Such tactics undermine the bond of trust that exists between the government and the people, and severely impairs the integrity of the jury system. Public confidence in the fairness of a criminal trial is diminished, and, most seriously, the democratic process is thwarted.

Id. at 1326.

C. The Due Process Right to a Fair Trial

The foundation of the entrapment by estoppel defense is two familiar Supreme Court cases, *Raley v. Ohio*, 360 U.S. 423 (1959) and *Cox v. Louisiana*, 379 U.S. 559 (1965). "Cox and Raley make clear that the purpose of the [defense] is to prevent fundamental unfairness and injustice." *Brady*, 710 F. Supp. at 295. The two cases, however, never use the word "estoppel," as the "doctrine stems from the due process clause." *Id.*; *See Levin*, 973 F.2d at 468 (entrapment by estoppel defense based on fundamental notions of fairness embodied in the Due Process Clause of the Constitution); *United States v. Austin*, 915 F.2d 363, 366 (8th Cir. 1990).

One commentator has argued that, in the case of an offense involving a specific intent, such as money laundering,

> there is no need for a constitutional entrapment by estoppel defense (predicated on the need to avoid fundamental unfairness) because a defendant who is affirmatively misled will lack the requisite criminal intent.

Sean Connelly, *Bad Advice: The Entrapment by Estoppel Doctrine in Criminal Law*, 48 U. Miami L. Rev. 627, 641 (1994); *See United States v. Buehler*, 793 F. Supp. 971, 975 (E.D. Wash. 1992, *aff'd*, 8 F.3d 31 (9th Cir. 1993)) ("When specific intent is an element of an offense, the fact that a defendant reasonably believes he is not violating any law would be a defense."). In other words, if Petitioner Dixon believed that the proceeds of his business were not criminally derived based of the words and actions of state officials, then he could not "knowingly" launder the proceeds.[3] To prohibit Petitioner Dixon from offering evidence as to his intent would jeopardize his due process right to a fair trial. *See* Colbert, 39 Stanford L. Rev. at 1316 ("The use of the motion in limine to exclude an entire defense poses serious threats to an accused's right to a fair trial.").

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3. If a defendant believes erroneous advice regarding the legality of the offense conduct, whether the advice comes from the government, from a lawyer, or in a dream, the defendant is not guilty of the crime.

United States v. Conley, 859 F.Supp. 909, 929 (W.D. Pa. 1994).

CONCLUSION

For reasons stated herein, the Petitioner respectfully requests that his petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DATED AND FILED JANUARY 27, 1999

No. 97-6088

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JERRY T. DIXON,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

OPINION

Before: JONES and COLE, Circuit Judges; and MARBLEY, District Judge.*

R. GUY COLE, JR., Circuit Judge. Defendant-Appellant Jerry T. Dixon appeals his conviction following his conditional guilty plea to one count of operating an illegal

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* The Honorable Algenon L. Marbley, United States District Judge for the Southern District of Ohio, sitting by designation.

gambling business, in violation of 18 U.S.C. § 1955; and one count of engaging in an unlawful monetary transaction, in violation of 18 U.S.C. § 1957. Specifically, Dixon challenges the district court's grant of the government's motion in limine which barred Dixon from presenting evidence regarding his alleged reliance upon the advice of state officials that his involvement in gambling was legal. For the reasons that follow, we **REVERSE** the judgment of the district court and **REMAND** for further proceedings in accordance with this opinion.

I.

Since 1969, Dixon has been in the amusement machine business. Dixon began placing video poker machines in clubs and businesses in 1980. The object of playing a video poker machine is to win points and then be reimbursed with cash for the accumulated points. Dixon placed video poker machines in the Macon County Country Club, a club that was frequented by various state law enforcement officials including District Attorney Tommy Thompson and Assistant District Attorney Johnny Wooten.

In the early 1980s, local law enforcement agents seized several video poker machines in the Macon County area, none of which belonged to Dixon. As a result of these seizures, Dixon became concerned about the legality of his machines and removed them from the various clubs at which they were located. In addition, Dixon asked Thompson whether the machines were legal. According to Dixon, Thompson replied, "Well, it would be okay. . . . I don't see anything more wrong with poker machines than I do the poker games they have

out there." Dixon further stated that he was never informed that the video poker machines were illegal; in fact, both Thompson and Wooten told him that the machines were "okay to have." Dixon admitted that he never discussed with Thompson or Wooten his practice of paying players for accumulated points; however, according to Dixon, it was general knowledge that cash payouts took place, and Wooten had knowledge of that practice. In addition, Dixon had demonstrated to Thompson how to play a video poker machine. Believing that the machines were legal, Dixon returned the video poker machines to the clubs.

The Federal Bureau of Investigation began investigating Dixon in 1992 for illegal gambling activities. In April of 1993, agents executed a search warrant and seized Dixon's gambling machines. A federal grand jury returned a fourteen-count indictment, charging Dixon with various gambling and money laundering offenses on November 22, 1996.[1] Count One alleged that Dixon operated an illegal gambling business, in violation of 18 U.S.C. § 1955.[2] Counts Two through Eleven charged Dixon with conducting financial transactions involving the proceeds of unlawful activity, in violation of 18 U.S.C. § 1956. Count Thirteen alleged that Dixon conducted a financial transaction involving over $10,000 in proceeds from an unlawful activity, in violation of 18 U.S.C.

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1. No explanation was given for the three-year delay.

2. Title 18 U.S.C. § 1955 defines an illegal gambling business as a gambling business which "is a violation of the law of a State or political subdivision in which it is conducted." The state law that was allegedly violated in this case is Tennessee Code Annotated § 39-17-504.

§ 1957. Count Twelve sought forfeiture of the monies involved in Counts Two through Eleven, and Count Fourteen sought forfeiture of the monies involved in Count Thirteen, pursuant to 18 U.S.C. § 982. On December 13, 1996, a superseding indictment was handed down for the purpose of correcting typographical errors in the original indictment.

The district court scheduled Dixon's trial to begin in March 1997. Prior to trial, Dixon filed a brief setting forth his intent to introduce evidence in support of his defense of "entrapment by estoppel."[3] The government then filed a motion in limine asking the court to prohibit Dixon from introducing evidence related to "any statements allegedly made by any state or local law enforcement official concerning the legality or illegality of the defendant's machines or business." The district court continued the trial and set an evidentiary hearing for an offer of proof regarding Dixon's entrapment by estoppel defense. At the hearing, the court heard the testimony of Dixon, Thompson, Wooten, Dewey Ferguson (the sheriff of Macon County), Buford Wix (the police chief of the city of Lafayette), and Jerry Dallas (a Lafayette police officer). Dixon further argued that the evidence regarding his reliance on the advice of state officials was also relevant with respect to his defense of good faith to the money laundering charges. Following the hearing, the district court granted the government's motion in limine, stating briefly that:

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3. The defense of entrapment by estoppel applies when a defendant, relying upon the advice of an authorized government official, believes that particular conduct is legal. *See United States v. Brebner*, 951 F.2d 1017, 1024 (9th Cir. 1991).

> the proffered testimony that you have outlined in support of this entrapment by estoppel [defense] is simply not an applicable defense in this case and this court will not permit it. And based on what is now apparent from the superseding indictment that it can't come in the back door in support of a claim of good faith, a defense in good faith with regard to this money laundering count.

Thereafter, Dixon entered a plea of guilty to Counts One and Thirteen, in exchange for the government's dismissal of the remaining counts. The plea agreement specifically preserved Dixon's right to appeal the district court's grant of the government's motion in limine. The district court sentenced Dixon to twenty-four months' incarceration. This appeal followed.

II.

The sole issue on appeal is whether the district court erred in granting the government's motion in limine which prohibited Dixon from presenting evidence regarding his reliance on the advice of state officials that his conduct was legal. We review a district court's decision to exclude evidence pursuant to a motion in limine for an abuse of discretion. *See United States v. Phibbs*, 999 F.2d 1053, 1078 (6th Cir. 1993).

A.

The United States Supreme Court, as well as numerous circuit courts, have recognized the defense of entrapment by

estoppel. *See, e.g., Cox v. Louisiana*, 379 U.S. 559 (1965). As stated, this defense applies "when an authorized government official tells the defendant that certain conduct is legal and the defendant believes the official." *See United States v. Brebner*, 951 F.2d 1017, 1024 (9th Cir. 1991). The defense of entrapment by estoppel is a constitutional defense "based upon fundamental notions of fairness embodied in the Due Process Clause." *United States v. Levin*, 973 F.2d 463, 468 (6th Cir. 1992).

The initial requirement for a defense of entrapment by estoppel is that the assurances upon which the defendant relied were made by an "authorized government official," which, in the case of a federal prosecution, must be a federal official. *See United States v. Hurst*, 951 F.2d 1490, 1499 (6th Cir. 1991); *see also Tinsley v. United States*, 1997 WL 63156 at *5 (6th Cir. Feb. 12, 1997); *United States v. Spires*, 79 F.3d 464, 466-67 (5th Cir. 1996); *United States v. Achter*, 52 F.3d 753, 755 (8th Cir. 1995); *United States v. Hall*, 1994 WL 408188 at *3 (6th Cir. Aug. 3, 1994); *Brebner*, 951 F.2d at 1026. In *Hurst*, the defendants were charged with violations of 18 U.S.C. § 1955 and asserted the defense of entrapment by estoppel based upon the alleged statements and actions of state officials. *See* 951 F.2d at 1499. This court upheld the district court's refusal to give a jury instruction on entrapment by estoppel, stating that the defense was not available because there was no evidence that the defendants were told by state officials that their conduct was legal and, "[m]oreover, the statements allegedly relied upon were made by state officials relating to state law, while the defendants were charged with violations of federal law." *Id.*

Appendix A

The circumstances of the present case are very similar to the circumstances of *Hurst*. Dixon, however, relies upon two district court cases which held that the assurances of state officials could, in fact, serve as the basis for the defense of entrapment by estoppel in a federal prosecution. *See United States v. Conley*, 859 F. Supp. 909, 932 (W.D. Pa. 1994); *United States v. Brady*, 710 F. Supp. 290, 294 (D. Colo. 1989). Dixon's reliance is misplaced. In *Hurst*, this court clearly stated, with respect to the same offense at issue in this case, that the defense of entrapment by estoppel is not available to a defendant who relies upon the advice of state officials. Considering the fact that an element of 18 U.S.C. § 1955 is a violation of state law, our holding in *Hurst* seems somewhat harsh; as Dixon argues, where else would an individual turn for advice as to the legality of particular actions under state law? Recognizing that conundrum, the *Hurst* court noted:

> One of the purposes of section 1955 was to aid in the enforcement of state gambling laws where state enforcement was corruption of state officials. Allowing a state official's alleged complicity in illegal activities to void the convictions here would violate the intent of Congress in enacting section 1955 and distort the clear due process doctrine set forth in [Supreme Court cases discussing entrapment by estoppel].

951 F.2d at 1499-1500 (citation omitted). Accordingly, we are bound to follow *Hurst*'s holding that entrapment by estoppel is not an available defense to violations of § 1955 when a defendant relies upon the advice of state officials.

B.

Our analysis, however, does not stop here. The district court's ruling had the effect of excluding **all** evidence regarding Dixon's reliance upon the advice of state officials. Dixon argued in the district court, on an alternative basis, that the proffered evidence was also relevant to his defense of good faith to the charges of money laundering. The district court rejected this argument, apparently accepting the government's contention that it was a "back door" method of admitting the evidence. We disagree.

Dixon was charged with ten counts of money laundering, in violation of 18 U.S.C. § 1956(a)(1)(A)(i). To prove that a defendant violated 18 U.S.C. § 1956(a)(1)(A)(i), the government must establish that the defendant: (1) conducted a financial transaction that involved the proceeds of unlawful activity; (2) knew the property involved was the proceeds of an unlawful activity; and (3) intended to promote that unlawful activity. *See United States v. Haun*, 90 F.3d 1096, 1100 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 691 (1997). Thus, in contrast to the federal gambling statute, which is a general intent crime, the knowledge requirement of 18 U.S.C. § 1956 makes it a specific intent crime, subject to a defense that a defendant lacked the requisite knowledge.

We first note that Dixon is not arguing that the defense of entrapment by estoppel is applicable to the money laundering charges, as that defense is generally not applicable to a specific intent crime. *See* Sean Connelly, *Bad Advice: The Entrapment by Estoppel Doctrine in Criminal Law*, 48 U. Miami L. Rev. 627, 641 (1994) (stating that "there is no

need for a constitutional entrapment by estoppel defense (predicated on the need to avoid fundamental unfairness) because a defendant who is affirmatively misled will lack of the requisite criminal intent").[4] Although Dixon is precluded from raising the defense of entrapment by estoppel, the evidence proffered by Dixon is relevant for another purpose — Dixon's state of mind with respect to the money laundering charges. Dixon's state of mind is an element of the offense; thus, the government must prove that Dixon knew that the property involved was the proceeds of an unlawful activity. Dixon's belief regarding the lawfulness of the video poker machines, including his reliance on the advice of state officials, is relevant to this issue.[5] We therefore hold that the district court abused its discretion by not allowing Dixon to present evidence regarding his reliance on the advice of state officials as a defense to the specific intent element of his money laundering charges. Accordingly, we reverse the district court's grant of the government's motion in limine.

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4. When a criminal statute requires specific proof of culpable intent, the constitutional defense of entrapment by estoppel is superfluous because a defendant who acted in good faith reliance on the advice of government officials that his conduct was legal cannot have the specific intent to commit the offense. *See Connelly, supra*, at 648.

5. The district court did not mention Fed. R. Evid. 403 in granting the government's motion in limine. To the extent that the district court relied on Rule 403, we note that the probative value of the excluded evidence was not substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury.

Appendix A

III.

For the foregoing reasons, we **REVERSE** the judgment of the district court and **REMAND** for further proceedings in accordance with this opinion.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NORTHEASTERN DIVISION DATED AND FILED JULY 14, 1997

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NORTHEASTERN DIVISION

No. 2-96-00014
Judge Higgins

UNITED STATES OF AMERICA

v.

JERRY DIXON

ORDER

For the reasons stated on the record[1] at the hearing on March 25, 1997, the government's motion (filed March 24, 1997; Docket Entry No. 51) in limine to prevent the defendant from introducing evidence regarding the defense of entrapment by estoppel was granted.

It is so ORDERED.

s/ Thomas A. Higgins
Thomas A. Higgins
United States District Judge

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1. *See* transcript filed June 2, 1997 (Docket Entry No. 98).

Appendix B

[stamp] This document was entered on the docket in compliance with Rule 55, FRCrimP, on 17-14-97, By: s/ AG [stamp]

Appendix B

97-6088

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
COOKEVILLE DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JERRY DIXON,

Defendant.

TRANSCRIPT OF PROCEEDINGS —
MOTION IN LIMINE & RULING

BEFORE THE HON. THOMAS A. HIGGINS,
U. S. District Judge
on March 25, 1997

* * *

[Commencing at page 6].

* * *

THE COURT: Well, we're trying a federal offense and the Court of Appeals for the Sixth Circuit said we need not apply these factors in the present case, however, because none

of the assurances on which Tinsley relies were made by an authorized government official for purposes of the entrapment by estoppel defense. When asserting this defense in regard to a federal crime, the defendant must have reasonably relied on assurances made by a federal — not state — official.

MR. STRIANSE: Your Honor, again, *Tinsley* —

THE COURT: Then they cite *Spires* from the Fifth Circuit; to satisfy the requirements of the defense when charged with a federal crime, a defendant must show reliance on either a federal government official or an authorized agent of the federal government.

MR. STRIANSE: That's purely a federal crime.

THE COURT: Well, this is purely a federal crime. We're not trying a state offense here, we're trying a federal crime.

MR. STRIANSE: But in order for Mr. Dixon to be found guilty of the federal offense, one of the essential jurisdictional elements is that he violated the Tennessee state law. Who else would a citizen look to for guidance on the Tennessee state law other than the local and state law [7] enforcement officials? If someone had a question about whether their conduct impacted a Tennessee statute, they certainly wouldn't call Mr. Harcum in Cookeville and ask him.

THE COURT: But the Court of Appeals has also dealt with that in the *Hurst* case that I decided. In *Tinsley*, in footnote five, the court says, The defendants in *Hurst* were charged violating gambling under 18 United States Code

1955. In our decision we noted that one of the purposes of section 1955 was to aid in the enforcement of state gambling laws where state officials — state enforcement was disabled by corruption of state officials. Allowing a state official's alleged complicity in illegal activities to void the conviction here would violate the intent of Congress in enacting Section 1955 and distortd the clear due process doctrine set forth in *Cox versus Enraley*.

MR. STRIANSE: Your Honor, we make no insistence that the state officials in this case were involved in any wrongdoing or were a part of the plan to have somebody just shrug off the law. That's not our position.

Our position is that they gave advice to my client and he relied on that advice. This is a defense, Your honor, that's been used in Judge Nixon's court in a federal gambling case, it's been used in Judge Echols' court in a federal gambling case, it was used last month before Judge

* * *

[32] laundering purposes that the government is relying on is the specified activity proscribed by 1955, the federal statute, and that underlying state offense is a jurisdictional matter. It's an element, but it's a jurisdictional matter.

Mr. Strianse, based upon your proffer, and believe me, sir, I'm going to give you the opportunity to flesh out the record to preserve your position in the record, however long it takes, by calling each of these witnesses and putting their proof in the record, but I am satisfied under *Hurst*, *Tinsley*

and the related cases, that under the facts of this case as they now appear based on this superseding indictment, that the proffered testimony that you have outlined in support of this entrapment by estoppel in simply not an applicable defense in this case and this court will not permit it. And based on what is now apparent from the superseding indictment that it can't come in the back door in support of a claim of good faith, a defense in good faith with regard to this money laundering count.

Now if I'm wrong, that's why the Court of Appeals sits in Cincinnati and the Supreme Court of the United States sits in Washington.

MR. STRIANSE: I understand that, Your Honor. But it's not quite that simple. You're putting us in the position of going forward today with no defense. And I don't think I'm limited by the imagination of Mr. Vincent [33] when he stands up here and says in the presence of people that don't have any defense, this court knows me as an officer of the court, knows that I don't come to court with no defense, just for the sport of having a trial. And I don't know why the court would force us to trial when I have made a lawyerlike representation to the court that we have put all of our eggs in this basket and now we're going to go through some minuet with the jury when we get our brains beat at out over the next week and he gets sentenced to 80 months, then I don't know what solace he can take in the fact while his case is matriculating through the Court of Appeals in Cincinnati that maybe they will take a look at it.

THE COURT: Well, now, I understand your appeal and respect your representation as an officer of the court. And I haven't dealt with the question of a continuance yet. But what's the situation going to be six weeks from now when you come in with another defense and it won't trot? Are you going to ask then —

MR. STRIANSE: No.

THE COURT: — for another continuance? The point is this is a matter that was subject to a fair debate, such as we've had here today, and in addition to the papers and a respectable contention could be made that you were chargeable with this might not trot.

* * *

[37] in and we talk about it, and it would give me an opportunity to talk to the government, to see if there is any way we could fashion — although the circuits are split on this, whether this kind of defense can be brought pretrial, some circuits say no, some circuits say yes, perhaps it could be a 12(b) motion, an evidentiary hearing and a conditional plea and an appeal. I don't know. I need to explore it with the government and with my client.

Or maybe I could announce at that status conference that we're unable to resolve it, we're going to trial and these are my defenses. And even the government can speak or forever hold their peace as to whether they think it's a legitimate defense or not.

THE COURT: Well, I want to give you every fair chance because a man's liberty is at stake and it's no trivial matter to just hustle a man into the penitentiary. And I think you know that I believe I am careful about that.

MR. STRIANSE: Yes, Your Honor.

THE COURT: That I'm conscious that when one disposes of the life and liberty of people, that under our constitutional form of government, that it behooves those who exercise that power to be careful about their business.

And I just respectfully disagree and hold on the basis of the authorities that I have cited and for the reasons I have articulated that the defense of entrapment by estoppel and the good faith defense based upon the same proof that's been proffered as a defense to the money laundering count simply is not cognizable as a matter of law under the law of this Circuit.

And I might add that part of that law was made arising out of a decision in a case that I tried right here, and that was the *Burnett* case, the state legislator, and these people from the Secretary of State's office and the lady over somewhere in east Tennessee, Ms. Hurst, who Mr. Richey from Knoxville, very competent federal criminal lawyer, represented. And that's a published opinion. And I held in the same fashion in that case: Simply absent a representation by a federal officer charged with law enforcement enforcing the particular statute or a state official who purported to act under authority of the federal government, that what you have proffered simply does not rise to a recognized defense.

Now Mr. Dixon and you disagree, and ultimately you can present it to the Court of Appeals and the Supreme Court of the United States, but that's the decision this court makes upon the record as it is now presented to this court.

Now on the question of a continuance. Given your representation, and I recognize the government has exerted a great effort to be prepared, out of an abundance of caution I'm going to grant the continuance.

* * *